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In The
Supreme Court of the United States
October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,
v.

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONER'S OPPOSITION TO
RESPONDENT UNIONS' MOTION
TO DISMISS WRIT OF CERTIORARI
FOR LACK OF JURISDICTION

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I. INTRODUCTION

Petitioner Air Courier Conference of America (ACCA) hereby opposes the Motion of Respondents American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO, to Dismiss the Writ for Lack of Jurisdiction (July 6, 1990) (Unions' Motion). The Unions argue that the Court improvidently granted ACCA's Petition for Writ of *Certiorari* (March 8,

1990), because: (1) the United States Postal Service's failure to petition for a writ of *certiorari* ended the case-or-controversy; (2) the Department of Justice's refusal to prosecute remailers under the Private Express Statutes (PES) deprives ACCA of standing under Article III; and (3) the district court erred by granting ACCA's motion to intervene below.

The Court should deny the motion, because there is a continuing case-or-controversy before the Court on the strength of both the Postal Service's presence and ACCA's independent standing. The Postal Service has filed a brief on the merits seeking reversal of the court of appeals' decision on both questions presented on *certiorari* and is therefore before the Court as a party adverse to the respondent Unions. ACCA's undisputed assertions of a direct interest in the subject-matter of the law suit below and irreparable injury from a successful challenge to the International Remail Rule (Rule) establish its independent standing pursuant to Article III. The Unions have waived their objections to ACCA's intervention and standing assertions which must be accepted as true and construed most favorably to ACCA. The Justice Department's refusal to prosecute remailers under the PES does not negate ACCA's independent standing, because remailers are subject to Postal Service searches and seizures under the PES.

In sum, the Court has jurisdiction over a continuing case-or-controversy based upon both the Postal Service's participation on *certiorari* seeking reversal of the court of appeals' decision and ACCA's independent standing. The Postal Service's failure to petition for *certiorari* is of no

substantive effect on the case-or-controversy before the Court.

II. STATEMENT OF FACTS

The Unions filed their complaint challenging the Postal Service's Rule on November 27, 1987. Jt. App. 107. ACCA made a timely motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure on January 29, 1988. Unions' Motion Appendix 2a (M.App.). In its supporting brief, ACCA stated that it was a trade association that included international remailers as members and those of its members engaged in remail account for virtually all remail business in the United States. *Id.* 36a. ACCA stated further that revocation of the Rule would cause irreparable injury to its members engaged in remail. *Id.* 4a. ACCA's brief went on to address each of the four requirements of the District of Columbia Circuit for intervention, including: (1) ACCA's "direct interest in the subject matter of th[e] lawsuit" (*id.* at 6a); (2) how an adverse decision would present ACCA's remailer members with the choice of foregoing \$ 50 million in annual sales or face civil suits and criminal prosecution under the PES (*id.* at 7a); and (3) that ACCA could not expect the Postal Service to adequately represent ACCA's interests, given its initial opposition to remail (*id.* at 8a-9a).

The Unions did not oppose ACCA's motion to intervene. The Postal Service also did not oppose ACCA's intervention, but suggested it be granted under Rule 24(b). The district court on February 26, 1988 issued an

order granting ACCA's motion pursuant to Rule 24(b) without comment. M.App. 1a.

ACCA participated in the cross-motions for summary judgment, supporting dismissal of the complaint in the district court. Jt. App. vii. ACCA monitored but did not participate in the appeal. Following the court of appeals' decision vacating summary judgment, but before its mandate issued, ACCA filed an appearance in the court of appeals. *Id.* at x. There is no deadline for filing appearances.

On March 8, 1990 ACCA filed its petition for a writ of *certiorari*. Although the Postal Service opposed the petition, it agreed that the court of appeals had erred and that ACCA is a proper petitioner.¹ The Unions opposed ACCA's petition, but failed to make any of the arguments advanced in Unions' instant motion.² On June 4, 1990 the Court granted ACCA's petition. On July 27, 1990, the date on which petitioner's brief was due, the Postal Service filed its brief on the merits seeking reversal of the court of appeals' decision on both questions presented to the Court by ACCA's petition.

¹ Brief of Federal Respondent in Opposition at 6-8 (May 9, 1990); *id.* n.1 citing *Bryant v. Yellen*, 447 U.S. 352 (1980). The Unions do not contest jurisdiction on the basis of ACCA's lack of participation, or the timing of ACCA's appearance, before the court of appeals.

² See Brief of American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO in Opposition (May 9, 1990).

III. DISCUSSION

A. THE POSTAL SERVICE'S PRESENCE ASSURES A CASE-OR-CONTROVERSY BEFORE THE COURT

By filing a 41 page brief on the merits in support of reversal of the court of appeals on both questions presented, the Postal Service guaranteed a continuing case-or-controversy within the Court's jurisdiction, irrespective of whether ACCA has independent standing. The Unions' reliance on *Diamond v. Charles*, 476 U.S. 54 (1986) as controlling a contrary result (Unions' Motion at 1-2, 10 *et seq.*) is misplaced. In *Diamond*, Justice O'Connor concurring, cited *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983) as holding that

once a case is properly brought here the case-or-controversy requirement can be satisfied even if the parties who are asserting their adverse interests before this Court are not formally aligned as adversaries.

476 U.S. at 72.

In *Perini*, the Director of Office Workers' Compensation Programs, not Churchill, the injured employee and the original claimant-appellant, filed for *certiorari*. Churchill filed a brief on the merits. The Court held that Churchill's presence "as a party respondent arguing for his coverage assures that an admittedly justifiable controversy is now before the Court." *Perini, supra*, 459 U.S. at 305. By contrast, the state of Illinois in *Diamond* merely filed a "letter of interest," filed no brief on the merits in support of its position below, and was therefore absent as an appellant. *Diamond, supra*, 476 U.S. at 61.

The facts here match *Perini's* and differ from *Diamond's*. Although the Postal Service did not petition, it remains a party pursuant to Rule 12.4. As the claimant in *Perini* and unlike the state of Illinois in *Diamond*, the Postal Service's filing of a brief on the merits, renders it an active "appellant" even though it is nominally a respondent.

Accordingly, the Court has jurisdiction of an active case-or-controversy.

B. ACCA'S INDEPENDENT STANDING SEPARATELY ASSURES A CASE-OR-CONTROVERSY

1. The Unions' Challenges to ACCA's Intervention and Standing Assertions are Untimely

The Unions contend "that ACCA was not a proper intervenor in the district court, for the reasons explained in Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. 71" (Unions' Motion at 16, n.14); presumably, that it "asserts no actual, present interest that would permit [it] to sue or be sued by [respondents]." 476 U.S. at 77. The Unions, having failed to oppose intervention,³ appeal the order granting it, cross-petition for *certiorari*, or oppose *certiorari* on the basis of ACCA's assertions of a direct interest and irreparable injury, it is

³ Quite apart from the fact that ACCA asserted the type of interest in the litigation that Dr. Diamond did not, in *Diamond* the appellees, unlike the Unions here, *did* object to Dr. Diamond's intervention. 479 U.S. at 58.

simply too late for them to challenge either ACCA's intervention or its assertions of standing on the basis of which the district court granted intervention.⁴

Even if the Unions had challenged ACCA's standing assertions, they must be accepted as true and construed in favor of ACCA. *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). In *Pennell* the Court stated

that when standing is challenged on the basis of pleadings, we "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party."

ACCA's assertions in its motion to intervene are the counterpart of allegations in support of standing in a complaint. Accordingly, ACCA's assertions of interest and injury must be accepted as true and construed in its favor, particularly given that neither original party ever challenged those assertions below.

As difficult as the Unions' attempts to overcome ACCA's assertions would have been in opposition to ACCA's petition for writ of *certiorari*, they should be beyond challenge by motion after the Court has granted

⁴ The Unions argue that "there was no occasion to raise the issue [of ACCA's intervention] in the court of appeals against the absent intervenor." Unions' Motion at 12 n.7. There was nothing to prevent the Unions from appealing the district court's intervention order except perhaps that, by having failed to oppose ACCA's motion to intervene, they were estopped from doing so. In any event, the Unions could not have known whether ACCA would participate in the appeal at the time they filed their notice of appeal, their docketing statement or appellants' brief. See *Jt. App.* ix.

the petition. Rule 15.1 of the Rules of the Supreme Court Rules admonishes counsel

that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceeding below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).⁵

It is far too late in this case for the Unions to seek review of the district court's order granting ACCA intervenor status. It is equally late for the Unions to question ACCA's assertions of a direct interest and irreparable injury in the guise of a jurisdictional attack on *certiorari*.

2. ACCA's Interest and Injury Establish Independent Standing Pursuant to Article III

ACCA's unassailable assertions of a direct interest in the Unions' suit below and of the irreparable injury to its

⁵ The Unions may argue that Rule 15.1 does not apply because they have styled their motion as challenging jurisdiction. Calling a motion jurisdictional does not make it so. While the Unions' case-or-controversy argument, however erroneous, may indeed be jurisdictional, the underlying challenge to ACCA's assertions of a direct interest in the controversy and irreparable injury from the potential demise of the International Remail Rule are no more than an attempt to raise a factual issue concerning ACCA's assertions in support of its standing, or to present an improper and belated cross-petition for *certiorari* for review of the district court's order granting intervention, see Rule 12.3.

remailer members that would inevitably result from a successful challenge to the International Remail Rule confer standing under Article III. *Pennell, supra; Lujan v. National Wildlife Federation*, 58 U.S.L.W. 5077 (June 27, 1990). In *Pennell*, the Court found standing on allegations that

appellants' properties are "subject to the terms of" the Ordinance, and . . . that the Association represents "most of the residential unit owners in the city and has many hardship tenants." Accepting the truth of these statements, which appellants do not contest, it is not "unadorned speculation" to conclude that the Ordinance will be enforced against members of the Association.

485 U.S. at 6 (internal citations and punctuation omitted).

As in *Pennell*, ACCA has stated that its "members engage in remail pursuant to the regulation at issue," Pet. at 3, and that its members "account for virtually all the private remail business in the United States," M.App. 3a. ACCA's assertions relevant to standing as an intervenor, are identical to the assertions the Court found sufficient to establish standing by plaintiffs in *Pennell*.

ACCA's independent standing maintains the case-or-controversy, regardless of the Postal Service's status on *certiorari*. ACCA and the Unions are on opposite sides of both the standing issue and the merits of the Postal Service's adoption of the Rule. ACCA's direct interest in upholding the Rule and the direct and irreparable injury its members would suffer if the Rule were stricken assure that, even without the Postal Service's participation, the

legal questions presented to the Court by ACCA's petition "will be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action [and] . . . a factual setting in which the litigant asserts a claim of injury in fact." *Perini, supra*, 459 U.S. at 305.

Indeed, the Postal Service's initial inclination to ban remail (Pet. Cert. at 4-5), its ability to offer ISAL (International Surface Air Lift) service – its own version of remail (Jt. App. 35) – , and its freedom to do so without threat of civil suits or criminal prosecution, whether or not the Rule is upheld, presents ACCA with a greater stake and a more direct interest in the Rule than the Postal Service. ACCA's interest is far from that of a self-avowed "conscientious objector" or peripherally interested by-stander as that of the intervenor in *Diamond*. ACCA is the party most directly interested in the International Remail Rule. ACCA's independent interests and standing thereby assure that the legal questions it has presented will be resolved in an appropriately concrete factual context.⁶

⁶ The Unions misplace their reliance, Unions' Motion at 10, upon the following language in *Diamond*: "because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. [727] at 740 [1972] in defending the standards embodied in that code." The statement is true on the facts in *Diamond*, but does not purport to be a general rule. See *City of Chicago v. Atchison Topeka & Santa Fe Ry.* 357 U.S. 77, 83 (1958) (intervenor had standing to defend city ordinance). The facts here are distinguishable: the Postal Service is not a state, but a government-owned corporation; the Rule is not a law, but a regulation; the Rule does not implicate Constitutional rights; and, most importantly, ACCA established a direct interest that Dr. Diamond did not.

3. The Justice Department's Refusal to Prosecute Remailers Does not Negate ACCA's Independent Standing

The Unions argue that ACCA lacks independent standing because the Justice Department's refusal of the Postal Service's requests for enforcement action against remailers precludes ACCA's members' asserted injury. Unions' Motion at 11. Insofar as the Unions seek to create an issue of fact, the Court should deem the Unions to have waived this argument by their failure to make it in opposition to ACCA's intervention, on appeal, or in opposition to *certiorari*. Rule 15.1. Should the Court in its discretion consider the Unions' argument, ACCA respectfully notes that the contention that prosecutorial discretion bars standing, is based on a faulty factual premise and is unsupported by the Unions' authorities.

First, the Unions' false premise, that only Justice Department action can injure remailers, is belied by 39 U.S.C. §§ 603-606. These provisions authorize Postal Service inspectors to search for, seize and dispose of materials that the Postal Service believes are improperly carried by remailers.

Second, the Unions have offered no legal authority that supports their proposition that a refusal to prosecute under prior law defeats standing to challenge or defend a new regulation modifying that prior law. The cases cited at pp. 11-12 of the Unions' motion are all irrelevant.⁷ That

⁷ *Whitmore v. Arkansas*, ___ U.S. ___, 110 S. Ct. 1717 (1990) is a third party death penalty appeal. *Hall v. Beals*, 396 U.S. 45 (1969) involved a challenge to a residency requirement for

(Continued on following page)

one petitioner or appellant lacks standing on one set of facts or that another's case has been mooted on another set of facts does not address the merits of the Unions' proposition on the facts of this case where none of the cases discusses any legal principle the Unions attempt to advance.⁸

(Continued from previous page)

voting that was mooted by an intervening amendment of the law and the passage of time. In *Los Angeles v. Lyons*, 461 U.S. 95 (1983) the plaintiff sought to enjoin the police department from using chokehold allegedly used on him. The Court found the chances of such hold ever being wrongfully used on him again were too remote to establish a case-or-controversy. As in *Diamond*, where Dr. Diamond was a "conscientious objector" to abortion, each of these cases involved plaintiffs with philosophical objections to death penalties, residency requirements and chokeholds that they had no more direct interest in challenging than the public at large. The Unions' reliance on *Pennell* is most curious inasmuch as the Court found standing on assertions identical to ACCA's. The Unions apparently confuse the Court's discussion of Constitutional ripeness in *Pennell* with the issue of standing here. In *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) the Court reacted to the issue of whether plaintiff's request for a declaratory judgment that its activities were in interstate commerce as a "so what" to the existence of a justiciable case. *Id.* at 244. The Unions' authorities merit the same observation.

⁸ Given that prosecutorial discretion will vary based on the facts, is subject to change over time and presumably will not be used to enforce prior law while an administrative suspension of that law is in effect, the Unions' argument, if adopted, would bar any intervenor from ever defending a regulation of which it is the beneficiary unless it was previously prosecuted under the prior law. Such a construction of standing would defeat the judicial efficiency rationale of intervention under Fed. R. Civ. P. 24.

In sum, the Unions' arguments based on the Justice Department's exercise of prosecutorial discretion are untimely and do not stand up to factual or legal scrutiny.

IV. CONCLUSION

The Court has jurisdiction if either the Postal Service is present as an adverse party to the Unions or if ACCA has independent standing. For the foregoing reasons, jurisdiction exists on both grounds. Accordingly, petitioner ACCA respectfully requests the Court to deny the Unions' motion to dismiss the grant of *certiorari*.

Respectfully submitted,

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